TEOH ENG HUAT

v.

THE KADHI OF PASIR MAS, KELANTAN & ANOR.

SUPREME COURT, KUALA LUMPUR
ABDUL HAMID OMAR LP
HASHIM YEOP SANI CJ (MALAYA)
LEE HUN HOE CJ (BORNEO)
GUNN CHIT TUAN SCJ
MOHD. JEMURI SERJAN SCJ
[SC CIVIL APPEAL NO. 220 OF 1986]
21 APRIL 1990

CONSTITUTIONAL LAW: *Appeal - Declaration that lawful father and guardian had the right to decide a minor's religion, education and upbringing - Parent of non-Muslim child - Guardianship of Infants Act 1961 - Articles 3, 11, 12 of the Constitution - Basis of constitution - Wider interest of the nation - Applicable law - Legal capacity of infant to choose her own religion.*

CHILDREN AND YOUNG PERSONS: *Guardianship of Infants Act 1961 - Legal capacity of minor to choose own religion - Capacity determined by civil law - Consent of guardian necessary.*

STATUTORY INTERPRETATION: *Spirit and intention of constitution and Guardianship of Infants Act 1961 - Wider interest of the nation.*

On 22 December 1985, the plaintiff's daughter, a minor (referred to as the infant) was converted to a Muslim. The plaintiff sought a declaration, at the Kota Bahru High Court, that the plaintiff, as the lawful father and guardian, had the right to decide her religion, education and upbringing. This application was dismissed with costs. The plaintiff appealed that decision. The infant has now reached majority and therefore the subject of the appeal is one only of academic interest.

The issue for determination at the appeal was whether an infant had the right of religious practice or whether this right was to be exercised by a parent or guardian.

Held:

[1] After a careful study of the grounds of judgment of the learned trial Judge, it was held that the trial Judge was wrong in both law and facts. The trial Judge's analysis and interpretation were based on wrong premises and not in accordance with the spirit and intention behind the respective legislation.

[2] Based on the circumstances of this case, the Court examined the purposes which the founding fathers of the Constitution had in mind when the constitution was drafted.

[3] In all the circumstances, in the wider interest of the nation, no infant shall have the automatic right to receive instructions relating to any other religion than his own without the permission of the parent or guardian.

[4] The law applicable to the infant at the time of conversion is the civil law. Consequently, the right of religious practice of the infant shall be exercised by the guardian on her behalf until he reaches majority.

[Appeal allowed. No order as to costs.]

Legislation referred to:
Federal Constitution, arts. 3, 8, 11, 12
Constitution of India [Ind], art. 28(3)2

For the appellant - Gooi Hock Seng, N. Shanmugam & M. Athimulan; M/s. Shan Gooi & Huang
For the 1st respondent - Md. Raus b. Sharif, L.A. Kelantan
For the 2nd respondent - Nik Saghir b. Mohd. Noor; M/s. Nik Saghir, Yaacob & Ismail

JUDGMENT

Abdul Hamid Omar LP:

This is an appeal from the judgment of the High Court, Kota Bahru. We heard the appeal on 2 March 1990 and gave a short oral judgment. We indicated that in view of the importance of this case we would give a written judgment. We do so now.

We have studied minutely the appeal records and given full weight to the various views expressed by the trial Judge and the Counsel before us. However, many of the issues dealt with by the learned Judge were not quite relevant for the decision of this appeal. In our grounds of judgment, we shall only place emphasis to those matters in respect of which we think some explanation would be helpful for future cases.

The facts of the case according to the affidavits filed and submission made by Counsel are quite simple in our view. The plaintiff is a Buddhist and his daughter Susie Teoh Bee Kue (referred to as "the infant") born on 5 April 1968 and nearing the age of 18 years, a minor by secular law, was found missing on 18 April 1985. The discovery of her absence was made by her boyfriend, Tan Boon Hwee. After futile searches for a week, the plaintiff's son-in-law then made a police report. Later it was reported that she was converted on 22 December 1985 as a Muslim by the Kadi of Pasir Mas, Kelantan. There is no evidence at all that the plaintiff's daughter was persuaded by any responsible person or authority in any manner to purportedly change her religion. In fact, it would appear that at the material time, the plaintiff's daughter had two boyfriends, one known and approved by the father and the other unknown to the father with whom apparently she disappeared, leaving no clue about her whereabouts, when the hearing took place.

The original action was filed in Kota Bahru High Court seeking a declaration that the plaintiff, as the lawful father and guardian has the right to decide her religion, education and upbringing. There were also other prayers seeking consequential relief. The application of the plaintiff was dismissed with costs. The girl has now reached the majority of age and therefore the appeal in so far as this case is concerned is purely of academic interest.

We have carefully studied the grounds of judgment by the learned Judge who made a thorough analysis of law and facts but in our considered opinion the trial Judge was wrong in both law and facts. It is to be observed that the learned Judge did not avail himself of the opportunity to interview the infant girl but formed certain inferences to the prejudice of the plaintiff, the father of Susie, based on possibilities of the situation. For the purpose of our decision, we need not elaborate more except to say that no religious authority, be it the first defendant or second defendant, was in any way to blame or to be held responsible for the course of events. The first defendant who purportedly converted Susie did so in good faith as he had no reason to doubt whatsoever story she told about her legal and factual status and affairs of life. What we are more concerned with is the Judge's purported elucidation of our constitutional law, especially relating to religion and the rights and powers of a parent of a non-Muslim child under the Guardianship of Infants Act 1961. While we cannot say

that his contents are totally devoid of merit, we feel that his analysis and interpretation, rooted on wrong premises are not in accordance with the spirit and intention behind respective legislation in particular in his attempts to maintain that the infant in this case, the plaintiff's daughter aged 17 years and eight months at the material time was a person who could decide for herself her religious training and religion in the exercise of her constitutional right. He bases his contention on clause (1) and (4) of Article 11 of our Constitution which reads "Every person has the right to profess and practice his religion and, subject to clause (4), to propagate it." The trial Judge's conclusion is that the expression "every person" means all those who are of sound mind and are in a position to decide. In support of his contention he quotes Article 12 of the Constitution which reads:

> (1) Without prejudice to the generality of Article 8, there shall be no discrimination against any citizen on the grounds only of religion, race, descent or place of birth:
>
> (a) in the administration of any educational institution maintained by a public authority, and, in particular, the admission of pupils or students or the payment of fees; or
>
> (b) in providing out of the funds of a public authority financial aid for the maintenance or education of pupils or students in any education institution (whether or not maintained by a public authority and whether within or outside the Federation).
>
> (2) Every religious group has the right to establish and maintain institutions for the education of children in its own religion, and there shall be no discrimination on the ground only of religion in any law relating to such institutions or in the administration of any such law; but it shall be lawful for the Federation or a State to establish or maintain or assist in establishing or maintaining Islamic Institutions or provide or assist in providing instruction in the religion of Islam and incur such expenditure as may be necessary for the purpose.
>
> (3) No person shall be required to receive instruction in or to take part in any ceremony or act of worship of a religion other than his own.
>
> (4) For the purposes of clause (3) the religion of a person under the age of eighteen years shall be decided by his parent or guardian.

The trial Judge summarises in his judgment that the word "requires" in clause (3) of s. 12 means some form of coercive element and that clause (3) is not applicable when one does the prohibited acts voluntarily. After saying so, he seeks support for his contention from sub-clause (4). In his opinion the words in sub-clause (4) "for the purpose of clause (3)" can only apply to that specific clause alone and not generally. The cumulative practical effect of Judge's interpretation is that any non-Muslim infant under the age of eighteen can decide his own religion, notwithstanding the wishes of the guardian or parent.

In fairness to the trial Judge, we have given considerable thought to the relevant Constitutional provisions, the provisions of the Guardianship of Infants Act 1961 and the circumstances behind the promulgation of our Constitution. Although normally, in accordance with usual judicial practice, we base our interpretive function on the printed letters of the legislation alone, in the instant case, we took liberty, as Lord Denning is reported to have done, to ascertain for ourselves what purpose the founding fathers of our Constitution had in mind when our Constitutional Laws were drafted. The Malaysian Constitution was not the product of an overnight thought but the brainchild of Constitutional and administrative experts from UK, Australia, India and West Pakistan, known commonly as the Reid Commission following the name of the Rt. Hon. Lord Reid, LLD., FRSE., a Lord of Appeal in the ordinary. Prior to the finding of the commission there were negotiations, discussions and consensus between the British Government, the Malay Rulers and the Alliance party representing various racial and religious groups. On religion the commission submitted:

169. We have considered the question whether there should be any statement in the Constitution to the effect that Islam should be the State religion. There was universal agreement that if any such provision were inserted it must be made clear that it would not in any way affect the civil rights of non-Muslims. In the memorandum submitted by the alliance it was stated:

'the religion of Malaysia shall be Islam. The observance of this principle shall not impose any disability on non-Muslim nationals profession and practising their own religions and shall not imply the State is not a secular State.' There is nothing in the draft Constitution to affect the continuance of the present position in the States with regard to recognition of Islam or to prevent the recognition of Islam in the federation by legislation or otherwise in any respect which does not prejudice the civil rights of individual non-Muslims. The majority of us think that it is best to leave the matter on this basis, looking to the fact that council for the rulers said to us - "it is Their Highnesses' considered view that it would not be desirable to insert some declaration such as has been suggested that the Muslim Faith or Islamic Faith be the established religion of the federation. Their Highnesses are not in favour of such a declaration being inserted ...

It was in the above basis that our Constitution was drafted and promulgated.

We are also mindful of Article 3 of the Constitution which says that Islam is the religion of the Federation; but other religions shall be practised in peace and harmony in any part of the federation.

An affirmation of Article 3 of the Constitution was specifically stated in para. 15 of the Malaysian Report of the Inter-Governmental Committee 1962. There was a similar affirmation of Article 11 of the Constitution (para. 15(2)).

Stripped of technical hairsplitting or purely academic arguments, it is our view that under normal circumstances, a parent or guardian (non-Muslim) has the right to decide the choice of various issues affecting an infant's life until he reaches the age of majority. Our view is fortified by the provisions of Guardianship of Infants Act 1961, which incorporates the rights, and liabilities of infants and regulates the relationship between infants and parents. We do not find favour with the learned Judge's view that the rights relating to religion is not covered by the Act on ground that the word "religion" is not clearly spelt out in the law. In our view religious practice is one of the rights of the infant, exercised by the guardian on his behalf until he becomes a major. In India Article 28(3)2 of the Indian Constitution states:

No person attending any educational institution recognised by the State or receiving aid out of State funds shall be required to take part in any religious instruction or in any premises attached thereto unless such person or, if such person is a minor, his guardian has given his consent thereto.

This section makes it incumbent to obtain consent of guardians.

In all the circumstances, we are of the view that in the wider interests of the nation, no infant shall have the automatic right to receive instructions relating to any other religion than his own without the permission of the parent or guardian.

Reverting to the issue before this Court, the crucial question remains whether the subject, an infant at the time of conversion, had legal capacity according to law applicable to her. It is our considered view that the law applicable to her immediately prior to her conversion is civil law. We do not agree with the learned Judge's decision that the subject although below 18 had capacity to choose her own religion. As the law applicable to the infant at the time of conversion is the civil law, the right of religious practice of the infant shall therefore be

exercised by the guardian on her behalf until she becomes a major. In short, we hold that a person under 18 does not have that right and in the case of non-Muslims the parent or guardian normally have the choice of the minor's religion.

We would observe that the appellant would have been entitled to the declaration he had asked for. However, we decline to make such declaration as the subject is no longer an infant.

The appeal is allowed with no order as to costs.

Also found at [1990] 2 CLJ 11